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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 80-55

THOMAS J. MASTRANGELO,
Appellant,

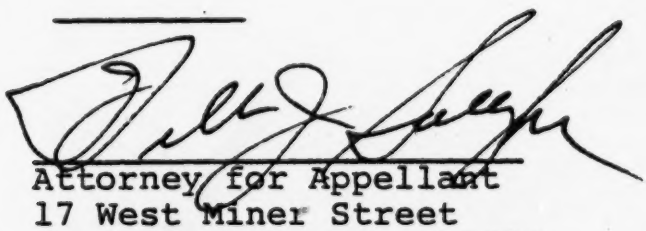
vs.

COMMONWEALTH OF PENNSYLVANIA,

Appellee

On appeal from the Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT



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IN THE SUPREME COURT OF THE UNITED STATES

TERM, 1980

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ON APPEAL FROM SUPREME COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

THE OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is not yet reported and is set forth in Appendix A, infra, pp. A-1 - A-26. Included within Appendix A

are a dissenting opinion and a concurring and dissenting opinion. The Petition for Allowance of Appeal and the Order allowing Appeal are set forth at Appendix B, infra, pp. B-1 - B-17.

The Superior Court of Pennsylvania rendered no opinion. Its Order re-affirming the judgment of sentence is set forth in Appendix C, infra, pp. C-1-C-2.

The opinion and order of the Court of Common Pleas of Chester County is not reported and is set forth in Appendix D, infra, pp. D-1 - D-3.

STATEMENT OF THE GROUND ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(i) This is an appeal from a judgment of sentence entered upon the

appellant by the Court of Common Pleas of Chester County on March 1, 1977, and affirmed by the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania. The appellant was found guilty of disorderly conduct, pursuant to §5503(a)(2) of the Pennsylvania Crimes Code, 18 C.P.S.A. §5503(a)(2), and of obstructing the administration of law or other governmental function, pursuant to §5101 of the Pennsylvania Crimes Code, 18 C.P.S.A. §5101.

(ii) The decision sought to be received is the judgment of the Supreme Court of Pennsylvania denying appellant's appeal from the affirmance by the Superior Court of Pennsylvania. That decision was entered on April 28, 1980. No petition for rehearing was filed.

The Notice of Appeal was filed in the Court of Common Pleas of Chester County, the Court possessed of the record, on June 19, 1980, and served upon on the Commonwealth on the same day. A certified copy of the Notice of Appeal and the Certification of Service is set forth at Appendix E, infra, pp. E-1 through E-2.

(iii) Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1257(2).

(iv) Cases believed to sustain the jurisdiction of this Court are:

Mishkin v. State of New York, 383 U.S. 502 (1966)

Bantam Books, Inc., v. Sullivan, 372 U.S. 58 (1963)

U.S. Air Lines, Inc. v. Mahin, 410 U.S. 623 (1973)

Cohen v. California, 403 U.S. 15 (1971)

(v) The validity of Section 5503(a)(2) of the Pennsylvania Crimes Code, 18 C.P.S.A. §5503(a)(2) is here involved. The full text of that section is as follows:

PENNSYLVANIA CRIMES CODE, §5503, 18 C.P.S.A. §5503

§5503. Disorderly Conduct

(a) Offense defined. A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

(1) engages in fighting or threatening , or in violent or tumultuous behavior;

(2) make unreasonable noise;

(3) uses obscene langauge, or makes an obscene gesture; or

(4) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

(b) Grading. An offense under this section is a misdemeanor of the third degree if the intent of the actor is to cause substantial harm or serious inconvenience, or if he persists in disorderly conduct after reasonable

warning or request to desist. Otherwise disorderly conduct is a summary offense.

(c) Definition. As used in this section the word "public" means affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, any neighborhood, or any premises which are open to the public. 1972, Dec. 6, P.L. , No. 334, §1, eff. June 6, 1973.

PENNSYLVANIA CRIMES CODE, §5101, 18 C.P.S.A. §5501

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§5101. Obstructing administration of law or other governmental function

A person commits a misdemeanor of the second degree if he intentionally obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act, except that this section does not apply to flight by a person charged with a crime,

refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference wtih governmental functions.

1972, Dec. 6, P.L. ____, No.334, §1, eff. June 6, 1973.

QUESTIONS PRESENTED BY THE APPEAL

Is the Section of the Pennsylvania Crimes Code providing for criminal penalties for "making unreasonable noise" under the description of disorderly conduct invalid on the ground of vagueness, infringing upon the First and Fourteenth Amendments to the United States Constitution?

Can the defendant be convicted of obstructing the administration of justice because he committed some "other unlawful act" when the charge of disorderly conduct which provides the basis for such "other unlawful act" must be dismissed as unconstitutionally vague?

STATEMENT OF THE CASE

This is a criminal matter in which the defendant was charged in four counts with various crimes as a result of incidents which allegedly occurred on February 3, 4, and 13, 1976. In a non-jury trial held before the Honorable G. Thomas Gates, specially presiding, on July 12, 1976, in the Court of Common Pleas of Chester County, the defendant was found guilty of disorderly conduct, pursuant to §5503(a)(2) of the Pennsylvania Crimes Code, 18 C.P.S.A. §5503(a)(2), and of obstructing the administration of law or other governmental function, pursuant to §5101 of the Pennsylvania Crimes Code, 18 C.P.S.A. §5101.

The testimony adduced at trial, viewed in the light most favorable to the Commonwealth, indicates that one Diane Young, a meter maid employed by the Borough of Phoenixville, Chester County, Pennsylvania, was on duty on February 3, 4, and 13, 1976, on Bridge Street in the Borough of Phoenixville. On February 3, 1976, Ms. Young placed a parking ticket on the defendant's automobile on Bridge Street, in Phoenixville, and the defendant yelled at Ms. Young and called her names. On February 4, 1976, Ms. Young was once again on Bridge Street, and the defendant again yelled at her and called her names. The meter maid testified that she was frightened by the defendant's conduct and that there were other

people on the street in the vicinity of the incident.

At the conclusion of the Commonwealth's evidence, defense counsel demurred to all four counts (R. 55a-57a). Defense counsel argued that there was insufficient evidence to convict the defendant of any of the four charges and that the charges under the disorderly conduct statute must be dismissed because that statute is unconstitutional on the ground of vagueness. The Court sustained the defendant's demurrer to the charge under §5503(a)(3) of the Crimes Code, on the ground that the statute was unconstitutional because there was no definition of the term "obscenity" (R. 56a), but refused the defendant's demurrer to the other three counts. (R. 57a).

At the conclusion of the case, the Court found the defendant not guilty of the charge under §6603(a)(4) of the Crimes Code and also specifically found the defendant not guilty of any criminal conduct on February 13, 1976, under any count of the indictment (R.92a093a). The Court found the defendant guilty of disorderly conduct by making unreasonable noise on February 3rd and 4th and also found the defendant guilty of obstruction of administration of law or other governmental function on February 3rd and 4th. The defendant timely filed motions for new trial and in arrest of judgment alleging as error various grounds, including the following grounds which are raised here

on appeal (R.96a, 97a): "The statute whereby a person may be found guilty of disorderly conduct if he makes unreasonable noise violates the defendant's rights under the United States and Pennsylvania Constitutions in that "unreasonable" is not sufficiently defined and the statute is vague"; and, "There was insufficient evidence to convict the defendant of the charge of obstructing administration of law or other governmental functions".

By Opinion and Order dated February 16, 1977, Judge Gates refused the defendant's post-trial motions, and on Tuesday, March 1, 1977, sentenced the defendant to a term of 1 to 23 months imprisonment and to pay a

fine of $500.00 on the disorderly conduct charge, the prison sentences to run concurrently.

The defendant timely filed his appeal to the Superior Court of Pennsylvania, and again raised the following grounds: "Whether the provision of the Pennsylvania Crimes Code which purports to criminalize "making unreasonable noise" under the description of disorderly conduct is invalid on the ground of vagueness, infringing upon the First and Fourteenth Amendments to the United States Constitution?"; and, "Whether the Court below should have sustained the defendant's demurrer to the charge of disorderly conduct by making unreasonable noise on the ground

that the Commonwealth failed to introduce sufficient evidence to constitute the crime charged?". On November 30, 1977, the Superior Court affirmed the lower Court, with Judge Hoffman dissenting.

The Supreme Court of Pennsylvania granted the defendant's timely petition for allowance of appeal on May 2, 1978. The above-mentioned issues were again raised by the defendant. On April 28, 1980, the Court, after argument, affirmed the judgment of sentence, with Justice Flaherty dissenting, and Justice Roberts filing a concurring and dissenting opinion. On the defendant's contention that the statute is facially invalid, the Court noted that it was limiting and

narrowing the statute in light of constitutional protections, and stated:

> We believe a man of common intelligence would understand what is and what is not made criminal under this statute, especially after we now make clear that the disorderly conduct statute may not be used to punish anyone exercising a protected First Amendment right. By so limiting this statute, appellant's facial attack concerning the vagueness of the disorderly conduct statute must fail.

Appendix A-13.

The Court also rejected the defendant's contention that, as applied to him, the statute was vague, saying:

> It is clear in the instant case that appellant was not exercising any constitutionally protected right; rather, in a loud, boisterous and disorderly fashion, he hurled epithets at the meter maid which we believe fit the Chaplinsky definition of fighting words. Even under our narrow construction of the disorderly conduct statute, we can find no merit in appellant's argument that the statute was invalid as applied

to him.

Appendix A-16 .

The Court similarly affirmed the lower Court's holding on the obstruction of administration of justice or other governmental function contention, in the following words:

> Instantly, appellant, through a course of disorderly conduct, intentionally obstructed a meter maid from carrying out her lawful duties and was thus properly convicted by more than sufficient evidence.

Appendix A-22 .

In dissenting opinion, Justice Flaherty found the statute to be unconstitutional on its face. Appendix A-23. Justice Roberts also dissented on the disorderly conduct holding, finding nothing in the record to suggest that the defendant's behavior constituted unreasonable noise. He

concurred with the affirmance of the judgment of sentence for obstructing the administration of law. Appendix A- [26].

THE FEDERAL QUESTION IS SUBSTANTIAL

This appeal involves a challenge to the validity of a state statute, based on its unconstitutional vagueness. The United States Supreme Court has fashioned two separate tests in the area of challenging for vagueness. See Comment, Recent Supreme Court Developments for the Vagueness Doctrine, 7. Conn. L.Rev. 94, 100 (1974); Note, The Void for Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960). These tests are separate and are differentiated according to whether the statute in question involves a First Amendment freedom, such as freedom of speech.

Where the statute affects First Amendment freedoms, this Court has held that a facial attack on the statute in question is mandated. In such a situation, the Court has further held that the conduct of an individual defendant is irrelevant to the facial challenge for vagueness. Gooding v. Wilson, 405 U.S. 518,520 (1972). The Court stated this succinctly in Coates v. City of Cincinnati, 402 U.S. 611 (1971) at page 616:

> We need not lament that we do not have before us the details of the conduct found to be annoying. It is the ordinance on its face that sets the standard of conduct and warns against transgression. The details of the offense could no more serve to validate this ordinance than could the details of an offense charged

under an ordinance suspending unconditionally the right of assembly and free speech.

A split of authority has developed among the state courts as to the manner of determining whether constitutionally protected rights, and more specifically, First Amendment rights, are affected by a statute. This case thus presents a compelling federal question in that it gives this Court an opportunity to decide which standards or factors are to be considered in deciding whether a facial attack on the vagueness of a statute should be successful.

(i) The Pennsylvania Supreme Court, upon facial challenge by the defendant to the disorderly conduct statute, has not used the proper

standard to decide whether Constitutionally protect rights have been chiled.

Under the guise of providing narrowing interpretations to their own vague statutes, the various states have protected statutes with impermissably chilling effects from constitutional challenge by inconsistent case by case determinations as to whether First Amendment rights are being affected. In many cases, this has been accomplished by the Court looking to the intent of the individual defendant to exercise his rights of free speech or association. In so doing, if the conduct of the defendant was found to be without any aspects of constitutionally protected exercise of rights, the statute was upheld on its face because it did not

affect such freedoms.

In essence, then, a facial challenge to a statute's validity is fashioned upon the individual conduct of a defendant, in derogation of the separate standards for challenges to vagueness established by this Court.

This result was achieved in Colten v. Kentucky, 407 U.S. 104 (1972), wherein this Court upheld the interpretation given by the Kentucky Court of Appeals to the Kentucky disorderly conduct statute. That statute, Ky. Rev. Stat. §437.016 (1)(f) (Supp. 1968) read as follows:

> (1) A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
> (f) Congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse...

The Kentucky Court then examined the conduct of the defendant, who had refused three requests by police to disperse from the scene of a traffic ticket incident, and ruled:

> In the instant case the evidence warranted the conclusion that Colten was not undertaking to exercise any constitutionally protected freedom. He was not exercising the right of freedom of speech because that right is concerned with expression of thought or dissemination of idea. [citations omitted]
> ... Colten's group appears to have had no purpose other than to cause inconvenience and annoyance. So the statute as applied here did not chill or stifle the exercise of any constitutional right. (emphasis supplied).

Colten v. Commonwealth, 467 SW 2d 374, 378 (Ky 1971)

This Court upheld the construction given by the Kentucky Court to its statute. It paraphrased this inter-

pretation as follows:

> As the Kentucky statute was construed by the state court, however, a crime is committed only where there is no bonafide intention to exercise a constitutional right -- in which event, by definition, the statute infringes no protected speech or conduct -- or where the interest so clearly outweighs the collective interest sought to be asserted that the latter must be deemed substantial.

Id. at 111.

This Court's traditional doctrine of deference towards state statutory construction has been extended by the Colten decision to a point where it now conflicts with the constitutional safeguards guaranteed to the public by the Bill of Rights. By the Colten decision, another foundation of the vagueness doctrine, as delineated in U.S. v. Reese, 92 U.S. 214 (1975)

has been superseded. As the Court said in Reese, at page 221:

> ... it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could rightfully be detained and who should be set at large.

In essence, then,the concern of this Court for what state courts do with a statute after the defendant has committed an offending act has been made paramount to how the statute might have been construed by the defendant at the time of the commission of the act. 109 U.Pa. L.R. 67, 84.

(ii) In the alternative, in light of the Colten decision, the unconstitutional vagueness of the Pennsylvania Disorderly Conduct Statute has not been cured by the Pennsylvania

Supreme Court's Construction of the Statute.

Assuming, arguendo, that the Kentucky court's interpretation of its statute successfully removed the constitutional infirmities of the statute, the question arises as to whether the Pennsylvania Court's construction is similarly curative. The Crimes Code section in question, 5503(a)(2) is promulgated pursuant to Article 250 of the Model Penal Code. As a result, the intent of the actor is now the focus of the statute, as opposed to the effect the actor's conduct has on others. In light of this, section 5503(a)(2) proscribes unreasonable noise where the actor

intentionally or recklessly causes or creates public inconvenience, annoyance or alarm. This wording is almost the exact wording of the Kentucky disorderly conduct statute.

In determining whether the Pennsylvania statute was facially invalid, the Pennsylvania Supreme Court did not look to the intent of the defendant, but rather concentrated on whether or not the statute provided fair notice of what was proscribed behavior. It then concluded:

> We believe a man of common intelligence would understand what is and what is not made criminal under this statute, especially after we now make clear that the disorderly conduct statute may not be used to punish anyone exercising a protected First Amendment right. By so limiting this statute, appellant's facial attack concerning the vagueness of the

disorderly conduct statute must fail.

By so stating, the Pennsylvania court declared what was already granted to the public by the Bill of Rights, without clarifying or removing the vagueness and over-breadth of the statute at hand. Unlike the Kentucky court in Colten , the Pennsylvania court did not distinguish the point at which a citizen's intent to exercise free speech must give way to the public's need for order and freedom of inconvenience. A citizen thus has no way of determining at what point he may be found to be recklessly creating a public inconvenience. It is therefore seen that construction of this statute by the Pennsylvania Supreme Court does not, at a minimum, meet the standards of

construction exercised by the Kentucky Court, and does not remove the chilling effect the statute has upon contemplated expression.

(iii) SIMILARLY THE PENNSYLVANIA SUPREME COURT DID NOT CURE THE CONSTITUTIONAL INFIRMITIES INHERENT IN THE PHRASE "UNREASONABLE NOISE", WHETHER THE STATUTE IS CHALLENGED BY FACIAL ATTACK OR BY REFERENCE TO THE CONDUCT OF THE DEFENDANT.

The crime of the defendant in this case consisted of yelling at a law enforcement officer. For this behavior, he was convicted and sentenced to a term of 1 to 23 months in prison under a statute which criminalizes "making unreasonable noise". This section of the statute

is patently infirm in that it violates the First and Fourteenth Amendments to the United States Constitution because its vagueness provides no ascertainable standard of the criminal conduct it proscribes and because it infringes upon the First and Fourteenth Amendment freedoms by allowing the police an unbridled discretion to arrest for speech.

Assuming that the state court's interpretation of the disorderly conduct statute limits the prohibitions of the statute to speech or conduct that is not within the definition of "protected speech", there is still

vagueness and overbreadth contained within the phrase "unreasonable noise". This phrase simply fails to contain a sufficiently ascertainable standard by which to adjudge conduct criminal and also permits police officers too wide a latitude to be constitutionally permissible.

The test for statutes challenged on their face because they infringe upon constitutionally protected rights has been enunciated by this Court in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). In that case, the Court invalidated a vagrancy statute, stating at page 162:

> This ordinance is void for vagueness, both in the sense that it fails to give a person of ordinary intellignece fair notice that this conduct is forbidden by the statute

> ... and because it encourages arbitrary and erratic arrests and convictions (citations omitted)

This statement of the law essentially focuses on two harmful aspects of vague criminal statutes. The first aspect which the Court finds unconstitutional is that such statutes contain broad, sweeping terms which tend to include within their definable limits conduct which may very well be constitutionally protected. In Gooding, the disapproved language was "opprobrious words or abusive language"; in Coates v. City of Cincinnati, the Court found unacceptable the phrase "annoying conduct"; while in Lewis, another "opprobrious language" statute was stricken by the Court. The Papachristou case, of course, involved a very vague-

ly and generally worded vagrancy statute. The other aspect of such statutes which the Court finds offensive is that these statutes permit law officers an unbridled discretion in their choice of when to arrest someone under such generally worded statutes. In discussing these dual infirmities of such statutes, the Court has variously expressed its displeasure with statutes which purport to allow a law officer to jail a citizen for using language offensive or insulting to the officer. In Coates, the Court explained that:

> "The city is free to prevent people from blocking sidewalks, or obstructing traffic, littering streets, committing assaults, or engag- in countless other forms of anti-

> social conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited. It cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether a policeman is annoyed." Coates v. City of Cincinnati, supra, at 614 (citations omitted; emphasis added).

The Court has, in all of these cases, shown a marked tendency to place severe constraints upon a law officer's authority to charge a defendant criminally for insulting or opprobrious language directed toward the officer. In Lewis v. City of New Orleans, the Court noted that the Model Penal Code suggests that even "fighting words" as defined in Chaplinsky should not be punished

when addressed to a law officer trained to exercise a higher degree of restraint than the average citizen. Lewis v. City of New Orleans, supra, at 132, n. 2, citing Model Penal Code, §250.1, Comment 4 (Tentative Draft No. 13 (1961)).

The Commonwealth in this case has proffered no evidence proving that the defendant made any "unreasonable noise". The Commonwealth proved merely that the defendant, on two separate occasions, yelled names at a Phoenixville police officer. The meter maid testified that she was frightened (R.19a) and that the effect of the defendant's words was only such as would cause her to leave

the area (R.16a). There was thus no testimony of any "unreasonable noise" which can be constitutionally regarded as criminal conduct.

How, then, is a defendant to determine if his speech constitutes "unreasonable noise"? The constitutional problems inherent in this phrase were addressed by the court in Marks v. City of Anchorage, 500 P. 2d 644 (1972). In language nearly identical to that of the Pennsylvania statute, the Alaskan Legislature criminalized unreasonable noise, as noted by the Court at page 645:

> It shall be unlawful for any person with purpose and intent to cause public inconvenience, annoyance, or alarm, or recklessly create a risk thereof by ...

(2) Making unreasonable noise...

In the Marks case, the court specifically held that both the prefatory language of the ordinance and the specific language of the statute of "making unreasonable noise" was unconstitutional on the ground of vagueness. The specific holding of the court was stated as follows:

> "We therefore hold that those portions of ... the ... ordinance which could be applied to protected speech---...'unreasonable noise'...---are unconstitutionally overbroad.
>
> In addition, the... ordinance suffers from the related constitutional infirmity of vagueness... the ordinance is... peppered with indefinite words---'unreasonable noise'...." Id. at 650-653.

In a subsequent case, the Supreme Court of Alaska again struck down a

similar ordinance on the same ground. In Poole v. State of Alaska, 524 P.2d 286 (1974), the Supreme Court held that the state's disorderly conduct statute which purported to criminalize conduct to the "disturbance or annoyance" of another was unconstitutionally vague and overbroad. In those cases, the Supreme Court of Alaska relied on several decisions of the United States Supreme Court, including Cohen v. California, 403 U.S. 215, 91 S.Ct. 780 (1971), in which the United States Supreme Court found that a California statute prohibiting disturbance of the peace by offensive conduct was unconstitutional. In that case, the court explained in detail how and why the

the law cannot be permitted to impinge upon First Amendment rights.

As Mr. Justice Harlan explained:

> "Finally, in arguments before this Court, much has been made of the claim that [defendant's] distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest. Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense.... The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections." 403 U.S. at 215, 91 S.Ct. at 786.

In addition, several of the lower federal courts have acted to invalidate similar statutes. In Gardner v. Ceci, et al., 312 Supp. 516 (E.D. Wis. 1970), the United States District Court for the Eastern District of Wisconsin struck down a city ordinance which purported to prohibit "loud and boisterous language" and "noise". In Pritikin v. Thurman, 311 F.Supp. 1400 (S.D. Fla. 1970), the United States Court for the Southern District of Florida found that an ordinance which prohibited "loud noise" and "unusual noise" was unconstitutional. Similarly, in Original Fayette County and Welfare League v. Ellington, 309 F. Supp. 89 (W.D. Tenn. 1970), the United

States District Court for the Western District of Tennessee, sitting in a three-judge panel, held that the Tennessee disorderly conduct statute prohibiting rude, boisterous, offensive, obscene or blasphemous language did not provide the fair warning required by the due process clause of the Fourteenth Amendment rights of freedom of speech and was therefore unconstitutional.

Finally, in Phillips v. Borough of Folcroft, Pennsylvania, et al., 305 F. Supp. 766 (E.D. Pa. 1969), the United States District Court for the Eastern District of Pennsylvania held that the Borough ordinance which attempted to prohibit "unnecessary and loud noises" was unconstitutionally

vague and overbroad. All of these cases from the lower federal courts, as well as the cases from the Supreme Court of Alaska, found that the ordinances were facially infirm without regard to the underlying conduct.

Interestingly, the Court in Colten was presented with similar grounds, but declined jurisdiction to decide the issue. The Court said at page 111, and in a related footnote:

> As we understand this case, appellant's own conduct was not immune under the First Amendment and neither is his conviction vulnerable on the grounds that the statute threatens constitutionally protected conduct of others.[3]
>
> 3 Appellant attacks on overbreadth grounds other subsections of the disorderly conduct statute, such as those that prohibit the making of an "unreasonable noise" and the use of "abusive or obscene language." Ky. Rev. Stat. §437.016 (b),(c) (Supp. 1968).

> But Colten was not convicted of violating these subsections and they are not properly before us in this case.

As can be seen, the Kentucky Court in Colten expressly declined to decide the pivotal issue before this Court, because the defendant had not been convicted of that charge. Thus, the Colten decision cannot be made to stand for more than a determination of whether the defendant had the requisite intent under the statute as limited and construed by the Court. The ruling of the Pennsylvania Supreme Court is consequently not mandated by the holding in Colten, which did not deal with the definitevness of the phrase "unreasonable noise". The Marks case, and its progeny, is the proper guidepost for deciding

this issue.

(iv) THE DEFENDANT CANNOT BE CONVICTED OF OBSTRUCTING THE ADMINISTRATION OF JUSTICE OR OTHER FUNCTION WHERE SAID CHARGE IS BASED UPON HIS UNCONSTITUTIONAL CONVICTION OF DISORDERLY CONDUCT.

The statute under which the defendant was convicted of obstructing the administration of law or other governmental function provides, in pertinent part, as follows:

> "A person commits a misdemeanor of the second degree if he intentionally obstructs, impairs, or perverts the administration of law or other governmental function by force, violence, physical interference, or obstacle, breach of official duty, or any other unlawful act...." 18 C.P.S.A. §5101.

Since the Commonwealth introduced no evidence of "force, violence,

physical interference, or obstacle, or breach of official duty" by the defendant it is apparent that the Commonwealth's case against the defendant on this charge rises or falls upon the question of whether the defendant interfered by some "unlawful act". Thus, in order to sustain the charge under this section, it is necessary that the charge under the disorderly conduct section be sustained. If the disorderly conduct charge is dismissed, the defendant cannot be said to have committed any "unlawful act", and the charge under §5101 must also fall. As pointed out in the foregoing portions of this brief, for various reasons,

the charge against the defendant of disorderly conduct must be dismissed; and, because that charge must be dismissed, this charge must similarly be dismissed.

In their opinion, the Supreme Court of Pennsylvania noted the grounds of this statute under which it was deciding. The Court said: "Instantly, appellant, through a course of disorderly conduct, intentionally obstructed a meter maid from carrying out her lawful duties and was thus properly convicted by more than sufficient evidence." Appendix A-22. By this decision, the Pennsylvania Supreme Court has

acknowledged that the only ground by which the obstruction of administration of law can be upheld in this case is by proof of violation of the disorderly conduct statute. If the conviction under that statute must fall for constitutional infirmities, so must the obstruction of administration of law conviction.

CONCLUSION

Based upon the foregoing authorities, the defendant respectfully requests that §5503(2) of the Pennsylvania Crimes Code be declared unconstitutional and that the defendant's conviction based thereon be dismissed. The defendant further requests that this case be remanded to the Supreme Court

of Pennsylvania for a decision on the obstruction of administration of law and the sentence, based upon the holding of the United States Supreme Court.

Respectfully submitted,

MacELREE, HARVEY, GALLAGHER, O'DONNELL & FEATHERMAN, LTD.

BY: _____
WILLIAM J. GALLAGHER
Attorney for Appellant

A P P E N D I X "A"

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

COMMONWEALTH OF PENNSYLVANIA

v.

THOMAS J. MASTRANGELO,
Appellant

No. 203 January Term, 1978

Appeal from Judgment of the Superior Court of November 30, 1977 at No. 1234 October Term, 1977 Affirming the Judgment of Sentence of the Court of Common Pleas, Criminal Division, Chester County, at No. 0346 of 1976

OPINION OF THE COURT

O'BRIEN, J.

Appellant, Thomas J. Mastrangelo, was convicted in a non-jury trial of disorderly conduct and obstructing

administration of law or other governmental function. Post-verdict motions were denied. Appellant was sentenced to concurrent prison terms of one to twenty-three months. Appellant was also ordered to pay two $500.00 fines. The Superior Court affirmed per curiam and we granted appellant's petition for allowance of appeal.

This case arises out of incidents that occurred in February, 1976 in the Borough of Phoenixville in Chester County. Appellant had a place of business called the "Blue Jay" on Bridge Street in Phoenixville. When the incidents in question occurred, appellant's car was parked on the street in front of his

establishment. The street was metered and was being patrolled by Diane Young, a meter maid employed by the Borough. According to Young's testimony, she was patrolling the street during the morning of February 3. She ticketed appellant's car, which was illegally parked at a meter. Appellant came out of his store and shouted at her, repeatedly calling her a "fucking pig". Ms. Young walked away, but appellant continued shouting at her.

On February 4, Ms. Young was again patrolling Bridge Street. She again observed appellant's car, but did not ticket it because it was legally parked. Nonetheless, appellant came

out of his store and followed Ms. Young along Bridge Street, shouting at her and calling her, among other things, a "nigger lover" and a "cocksucker". Ms. Young asked appellant to leave her alone, but he continued to follow her, yelling the entire time, until she left the area. On both occasions, Ms. Young testified that bystanders on the street observed appellant's conduct; none, however, testified in court.

Ms. Young also testified that appellant's actions had frightened her. In fact, Ms. Young did not patrol Bridge Street from February 5 to February 12 because of her fear of appellant.

Appellant first argues that the charge against him for disorderly conduct must be dismissed because the statute under which he was charged is facially invalid on the ground of vagueness or, in the alternative, is invalid as applied to him. Appellant was convicted under the disorderly conduct statute, which provides:

> "(a) Offense defined - A person is guilty of disorderly conduct if, with the intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
>
> * * *
>
> "(2) Makes unreasonable noise.
>
> * * *

"(b) Grading. - An offense is a misdemeanor of the third degree if the intent of the actor is to cause substantial harm or serious inconvenience, or if he persists in disorderly conduct after reasonable warning or request to desist. Otherwise disorderly conduct is a summary offense.

"(c) Definition - As used in this section, the word "public" means affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, any neighborhood, or any premises which are open to the public." Act of December 6, 1972, P.L. ___, No. 334, §1, 18 C.P.S.A. §5503. (Emphasis added)

In Connally v. General Construction Co., 269 U.S. 385, 391 (1926), the Court stated:

"That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinanary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due processof law."

In reviewing appellant's facial attack on the vagueness of the statute in question, it is important to remember, as we stated in Commonwealth v. Heinbaugh, 467 Pa. 1, 4-5, 354 A.2d 244, ___ (1976), that:

"Absent the assertion of an infringement of First Amendment freedoms, the specificity of a statute must be measured against the conduct in which the party challenging the statute has engaged." (Footnote omitted)

Appellant argues that the disorderly conduct statute is so vague that a man of common intelligence could reasonably believe the statute made criminal the valid exercise of a protected First Amendment right.

Although appellant's claim is that the statute is vague, aspects of overbreadth analysis are brought into play. As Mr. Justice Pomeroy has aptly stated:

> "If a colorable claim is asserted that enforcement of a statute would infringe upon the exercise of protected First Amendment activity by the public then a facial attack upon the statute may be proper. While the overbreadth and vagueness theories upon which appellees rely have distinct constitutional bases, they serve a common function when advanced to challenge a statutory provision which colorably infringes upon the public's exercise of First Amendment freedoms. The vice

which both theories attack is an impermissible chilling effect on conduct which may be protected. Whether that effect is generated by statutory terms which, while definite, are too broad in sweep, or by statutory terms the sweep of which is unknown because the terms are too imprecise, the infringement on First Amendment freedoms is the same, members of the public are forced to risk criminal prosecution in order to engage in activity which may be protected by the First Amendment. The public's interest in guarding against such infringements is sufficiently important that any defendant may challenge the constitutionality of the language of the statute as it might be applied to the public at large, notwithstanding that his own actual conduct may not be protected by the First Amendment. As a consequence, a statute which is challenged on First Amendment overbreadth or vagueness grounds may be scrutinized by a court on its face, not in light of its application in the particular case before the court.

"See Lewis v. City of New Orleans, 415 U.S. 130, 94 S. Ct. 970, 39 L.Ed. 2d 214 (1974); Coates v. City of Cincinnati, 402 U.S. 611,

91 S.Ct. 1686, 20 L.Ed.2d 214 (1971); Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct.736, 84 L.Ed. 1093 (1940); Note, The First Amendment Overbreadth Doctrine, 83 Harv. L.Rev. 884 (1970); Note, Due Process Requirement of Definiteness in Statutes, 62 Har.L.Rev. 77 (1948); Note, The Void for Vagueness Doctrine in the Supreme Court, 109 U.Pa.L.Rev. 67(1960)." Commonwealth v. Cook, 468 Pa. 249, 257, 361 A.2d 274, _____(1976) (Concurring Opinion_ (Emphasis added.)

It is well-settled that when faced with a state statute, the constitutionality of which is being challenged on grounds of vagueness and overbreadth, the United States Supreme Court is required to accept any narrowing and limiting construction given the statute by the state courts. Gooding v. Wilson, 405 U.S. 518 (1971); Coates v. City of Cincinnati, 402 U.S. 611 (1971). As

the instant appeal presents this court with its first opportunity to examine the constitutionality of our disorderly conduct statute, we are thus free, and in fact obligated, to narrow and limit said statute in light of the protections guaranteed by the United States and Pennsylvania Constitutions.

A state, in a valid exercise of its police power, may enact laws to protect the public peace.[1] In response to this obligation, the legislature passed the aforementioned disorderly conduct statute, which, by its terms prohibits any person from intentionally or recklessly causing or creating a risk of public inconvenience, annoyance or alarm by making un-

reasonable noise. Regarding the intent element, one commentator has stated:

> "The heavy emphasis of the new statutory language on the intent or knowledge of the actor rightfully supplants the former focus on the effects of the actor's conduct on others, since one of the basic postulates of the criminal law is to base punishment on the unlawful intent or mens rea of the actor. A mentally competent individual has a choice between acting lawfully or unlawfully in a given situation and, if he wilfully chooses the unlawful course of action, he is punished. It is inconsistent with this theory to punish solely for the effect which one's lawful conduct has on others. Under the generally imprecise language of the prior laws, this was entirely possible. For example, a speaker, who had no intention to disrupt, could have been held criminally liable for the provocation of unruly behavior in those hostile to his public statements. This is no longer true under the new Code. Punishable offenses in this area are now limited to that

> unlawful behavior which in and of itself disturbs the public order and tranquility." Comment, Public Disorder Offenses Under Pennsylvania's New Crimes Code, 78 Dick. L.R. 15, 30 (1973). (Footnotes omitted.)

[1]Comment, Public Disorder Offenses Under Pennsylvania's New Crimes Code, 78 Dick.L.R. 15 (1973).

Further, the element of "unreasonable noise had been defined under prior law as "not fitting or proper in respect to the conventional standards of organized society or a legally construed community". Commonwealth v. Greene, 410 Pa. 111, 113, 188 A.2d 725 (1963). We believe a man of common intelligence would understand what is and what is not made criminal under this statute, especially after we now make clear

that the disorderly conduct statute may not be used to punish anyone exercising a protected First Amendment right. By so limiting this statute, appellant's facial attack concerning the vagueness of the disorderly conduct statute must fail. Commonwealth v. DeFrancesco, 481 Pa. 595, 393 A.2d 321 (1978).

Having determined the disorderly conduct statute is not facially vague, we must now determine whether the statute was constitutionally applied to appellant. In Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942), the Court stated:

"Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional probelm. These include the lewd and obscene, the profane, the libelous, and the insulting of 'fighting' words - - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by teh social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safe-guarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' Cantwell v. Connecticut, 310 U.S. 296, 309-310." (Footnotes omitted)

It is clear in the instant case that appellant was not exercising any

consitutionally protected right; rather, in a loud, boisterous and disorderly fashion, he hurled epithets at the meter maid which we believe fit the Chaplinsky definition of fighting words. Even under our narrow construction of the disorderly conduct statute, we can find no merit in appellant's argument that the statute was invalid as applied to him.

In Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972), the Court held that a statute could be void for vagueness if it encouraged arbitrary and erratic arrests and convictions. Thus, if a statute's meaning is sufficiently unclear with the result of allowing unbridled police and

judicial discretion to determine who may be arrested and convicted, said statute should bedeclared unconstitutionally vague. We believe, however, that our disorderly conduct statute is not so vague as to allow the dangers above described. We thus reject appellant's vagueness attack in its entirety. Commonwealth v. DeFrancesco, supra.

Appellant frames his final two issues as follows:

> "Whether the Court below should have sustained the defendant's demurrer to the charge of disorderly conduct by making unreasonable noise on the ground that the Commonwealth failed to introduce sufficient evidence to constitute the crime charged?

"Whether the Court below should have sustained the defendant's demurrer to the charge of obstructing administration of law or other governmental function on the ground that the Commonwealth failed to introduce sufficient evidence to constitute the crime charged?"

In a footnote in Commonwealth v. Ilgenfritz, 466 Pa. 345, 347-48, 353 A.2d 387, ____ (1976), we stated:

"The appellant frames this question in terms of whether the trial court erred in not sustaining his demurrer to the evidence for lack of proof of cuase of death. Since, however, the defendant did not rest following this adverse ruling, but elected to put in a case in defense, the correctness of the ruling on the demurrer is no longer an available issue. See Commonwealth v. Moore , 398 Pa. 198, 201-202, 157 A.2d 65 (1959); Commonwealth v. Spanos, 167 Pa. Super. 629, 631, 76 A.2d 243 (1950). But see Commonwealth v. Henderson, 451 Pa. 452, 304 A.2d 154 (1973). We have chosen, nevertheless, to treat the question as if properly framed, namely, whether the trial court erred in

> refusing defendant's motion in arrest of judgment. In doing so, of course, we consider all of the evidence at trial, not only that contained in the Commonwealth's case in chief. See Commonwealth v. Terenda, 433 Pa. 519, 252 A.2d 635 (1969); Commonwealth v. Tabb, 417 Pa. 13, 207 A.2d 884 (1965); Commonwealth v. Moore, aupra; Commonwealth v. Kohne, 204 Pa. Super. 78, 203 A.2d 401 (1964); Commonwealth v. Gomori, 192 Pa. Super. 325, 161 A.2d 649 (1960); Commonwealth v. Cerzullo, 175 Pa. Super. 330, 104 A.2d 179 (1954)."

In the instant case, appellant put on a case in defense, so that the ruling on the demurrer is no longer an available issue. As in Ilgenfritz, however, we will treat the issues as a properly framed challenge to the sufficiency of the evidence to sustain appellant's convictions. Finding the evidence to be sufficient in both instances, we affirm.

As we have oft stated:

> "Our test for passing on the sufficiency of the evidence is well-known: '"[T]he test of sufficiency of evidence is whether accepting as true all the evidence, together with all reasonable inferences therefrom upon which the jury could properly have based its verdict, such evidence and inferences are sufficient in law to prove guilt beyond a reasonable doubt."' Commonwealth v. Carbonetto, 455 Pa. 93, 95, 314 A.2d 304, 315 (1974). See also Commonwealth v. Green, 464 Pa. 557, 347 A.2d 682 (1975); Commonwealth v. Long, 460 Pa. 461, 333 A.2d 386 (1975); Commonwealth v. Clark, 454 Pa. 329, 311 A.2d 910 (1973); Commonwealth v. Oates, 448 Pa. 486, 295 A.2d 337 (1972). In addition, we are to consider the evidence in the light most favorable to the Commonwealth as theverdict winner. Commonwealth v. Green, supra; Commonwealth v. Rife, 454 Pa. 506, 509, 312 A.2d 406 (1973); Commonwealth v. Rankin, 441 Pa. 401, 404, 272 A.2d 886 (1971)." Commonwealth v. Ilgenfritz, supra, at 348, ____.

As previously mentioned, one is guilty of disorderly conduct if, with

the intent of breaching the public peace, he makes unreasonable noise. We believe our discussion concerning the constitutionality of the disorderly conduct statute as applied to appellant shows that the evidence presented at trial was sufficient to sustain appellant's conviction for that crime. Suffice it to note that appellant's criminal conduct was properly graded as a misdemeanor, since he persisted in his disorderly conduct after being asked by Ms. Young to desist.

The Act of December 6, 1972, P.L. ____, No. 334, §1, 18 C.P.S.A. §5101 provides:

> "A person commits a misdemeanor of the second degree

> if he intentionally obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act, except that this section does not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affrimative interference with governmental functions." (Emphasis added.)

Instantly, appellant, through a course of disorderly conduct, intentionally obstructed a meter maid from carrying out her lawful duties and was thus properly convicted by more than sufficient evidence.

Judgments of sentence affirmed.

Mr. Justice Roberts files a Concurring and Dissenting Opinion.

Mr. Justice Flaherty files a Dissenting Opinion.

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

COMMONWEALTH OF PENNSYLVANIA,

v.

THOMAS J. MASTRANGELO,
Appellant

No. 203 January Term, 1978

Appeal from Judgment of the Superior Court of November 30, 1977 at No. 1234 Octobert Term, 1977, Affirming the Judgment of Sentence of the Court of Common Pleas, Criminal Division, Chester County, at No. 0346 of 1976

DISSENTING OPINION

Mr. Justice Flaherty

The statute in question defines the offense as follows:

> "A person is guilty of disorderly conduct if, with the intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
>
> (2) Makes unreasonable noise."
>
> (emphasis supplied)

Mr. Justice Manderino dissenting in

Commonwealth v. Cook, 468 Pa. 249, 263, 361 A.2d 274, 281-82 (1976) said:

> 'What is "serious inconvenience, annoyance or alarm"? Those are all value words which depend entirely upon the personal views of each of us. What constitutes annoyance to one person is not always annoyance to another. Nor does inconvenience mean the same to all. For instance the sounds of a parade, or even the parade itself, may cause great public inconvenience to many, while at the same time be a source of pleasure to others... A facial attack on a statute is indeed proper if the scope of the statute is so broad that it could be read as restricting or forbidding conduct which is protected by the First Amendment. See Lewis v. City of New Orleans, 415 U.S. 130, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974); Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974).'

Certainly, one does not have to strain to imagine this statute being read to restrict conduct protected by the First Amendment, and one must speculate at its meaning and application.

I therefore dissent and would declare the subject statute unconstitutional on its face.

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

COMMONWEALTH OF PENNSYLVANIA

vs.

THOMASJ. MASTRANGELO,
Appellant

NO. 203 January Term, 1978

Appeal from Judgment of the Superior Court of November 30, 1977 at No. 1234 October Term, 1977, Affirming the Judgment of the Court of Common Pleas, Criminal Division, Chester County, at No. 0346 of 1976.

CONCURRING AND DISSENTING OPINION

ROBERTS, J.

I agree with the majority that appellant's conviction for obstructing the administration of law must be affirmed. The record clearly establishes

appellant's abusive, threatening remarks to Ms. Young caused her fear and alarm and prevented her from properly performing her duties as a meter maid.

I cannot agree, however, that the Commonwealth has produced sufficient evidence to convict appellant of disorderly conduct. There is simply nothing in this record to suggest that appellant's remarks, shocking and unpardonable as they are, produced "unreasonable noise." 18 Pa. C.S.A. §5503(a)(2). This subsection of the statute is plainly not intended to criminalize speech and I would not sanction its use in such a way. I would reverse the judgment of sentence based only on appellant's conviction for

disorderly conduct and affirm judgment of sentence for obstructing the administration of law.

A P P E N D I X "B"

PETITION FOR ALLOWANCE OF APPEAL FROM THE OPINION AND ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA, PHILADELPHIA DISTRICT, TO NO. 1234 OCTOBER TERM, 1977, AFFIRMING THE JUDGMENT OF SENTENCE OF THE COURT OF COMMON PLEAS OF CHESTER COUNTY

TO NO. 346 of 1976.

HISTORY OF THE CASE

This is a criminal matter in which the defendant was charged in four counts with various crimes as a result of incidents which allegedly occurred on February 3,4, and 13th, 1976. In a non-jury trial held before the Honorable G. Thomas Gates, specially presiding on July 12, 1976,

in the Court of Common Pleas of Chester County, the defendant was found guilty of disorderly conduct, pursuant to section 5503(a)(2) of the Pennsylvania Crimes Code, and of obstructing the administration of law or other governmental function, pursuant to section 5101 of the Pennsylvania Crimes Code. He was found not guilty of disorderly conduct under section 5503(a)(4) of the Crimes Code and the Court sustained the defendant's demurrer to the charge of disorderly conduct under section 5503 (a)(3) of the Crimes Code. By his Opinion and Order of February 16, 1977, Judge Gates denied the defendant's Post Trial Motions for new trial and in arrest of judgment and on Tuesday,

March 1, 1977, sentenced the defendant to a term of imprisonment from one to twenty-three months and to pay a fine of Five Hundred Dollars. Defendant timely filed his appeal in the Superior Court and by its Order of November 30, 1977, that Court affirmed the Trial Court's judgment of sentence, Judge Hoffman dissenting. True and correct copies of the Opinion and Order of the Superior Court and the Opinion and Order of the Court of Common Pleas of Chester County are attached hereto, marked Exhibits "A & B" respectively and made a part hereof.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the provision of the Pennsylvania Crimes Code which purports to criminalize "making unreasonable noise" under the description of disorderly conduct is invalid on the ground of vagueness, infringing upon the First and Fourteen Amendments to the United States Constitution?

II. Whether the court below should have sustained defendant's demurrer to the charge of disorderly conduct by making unreasonable noise on the ground that the Commonwealth filaed to introduce sufficient evidence to constitute the crime charged?

III. Whether the court below should have sustained defendant's demurrer to the charge of obstructing administration of law or other govern-

mental function on the ground that the Commonwealth failed to introduce sufficient evidence to constitute the crime charged?

STATEMENT OF THE CASE

The testimony produced at trial in this matter, viewed in the light most favorable to the Commonwealth, proves that one Diane Young, a police meter maid employed by the Borough of Phoenixville, Chester County, Pennsylvania, was on duty on February 3, 4 and 13, 1976, on Bridge Street in the Borough of Phoenixville. On February 3, 1976, Ms. Young placed a parking ticket on the defendant's automobile on Bridge Street and the

defendant yelled at Ms. Young and called her names. On February 4, 1976, Ms. Young was once again on Bridge Street, and the defendant again yelled at her and called her names. She also testified that she was frightened by the defendant's conduct and that there were other people on the street in the vicinity of these incidents.

At the conclusion of the Commonwealth's evidence, defense counsel demurred to all four counts (R. 55a-57a). The Court sustained the defendant's demurrer to the charge under section 5503 (a)(3) of the Crimes Code but refused the demurrer to the other three counts.

At the conclusion of the case, the Court found the defendant not guilty

of the charge under section 5503(a)(4) of the Crimes Code and in addition, specifically found that the defendant was not guilty of any criminal conduct on the date of February 13, 1976, under any count of the indictment. (R. 92a-93a). The defendant was found guilty of disorderly conduct by "making unreasonable noise" on February 3, and 4th and of obstruction of the administration of law or other governmental function on February 3, and 4th. Subsequently, the Trial Judge imposed a term of imprisonment upon the defendant as well as a substantial fine.

REASONS RELIED UPON FOR ALLOWANCE OF APPEAL

The primary issue which Petitioner wishes to raise in this Honorable Court is the constitutionality of the section of the Pennsylvania Crimes Code which permits a person to be imprisoned because he or she "makes unreasonable noise." This statute, which is set out in full in Exhibit "C", attached hereto and made a part hereof, provides in pertinent part as follows:

> A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk therof; he;
> ... (2) makes unreasonable noise;
> ....

18 C.P.S.A. §5503(a)(2)

Pursuant to the above statute, the defendant in this case, whose heinous crime consisted entirely of yelling at an on duty police officer and calling that on duty police officer abusive names ,has been sentenced to a term of imprisonment of one to twenty-three months. In affirming the lower Court's judgment of sentence on these facts purusant to the aforesaid statute, the Superior Court has decided the issue of the constitutionality of the above statute in a way that is not in accord with the applicable decisions of the United States Supreme Court.

In a long line of cases, the United States Supreme Court has held that statutes very like the statute in the instant case are facially invalid.

In Lewis v. City of New Orleans, 415 U.S. 130 (1974, Gooding v. Wilson, 405 U.S. 518 (1972), and in Coates v. City of Cincinnati, 402 U.S. 611 (1971), the United States Supreme Court struck down substantially similar statutes which purported to criminalize conduct nearly identical to the conduct in the case at bar. These cases dealt with statutes which infringed upon the First Amendment and involved straight facial attacks upon the ordinances or statutes in question. Since the instant statute dealing with "making unreasonable noise" obviously deals with First Amendment freedoms also, this is the rule which should be applied in the instant case. However, even if it is determined that this statute must be

viewed in light of the particular facts involved in the case, this statute must also fall. See United States v. Mazurie, 419 U.S. 544 (1975), United States v. National Dairy Products Corp., 373 U.S. 29 (1963). The vagueness doctrine, most clearly enunciated by the Supreme Court in Papachristrou v. City of Jacksonville, 402 U.S. 156 (1972), clearly describes the statute under which the instant defendant was convicted. As the United States Supreme Court explained the issue:

> This ordinance is void for vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that this contemplated conduct is forbidden by the statute' ... and because it encourages arbitrary and erratic arrests and convictions.

Id. at 162.

Both of these harmful aspects of vagueness are plainly presented in the instant criminal statute. The law should not require man of ordinary intelligence to speculate, at the risk of imprisonment, upon what is "unreasonable noise" nor should the law permit police officers to arbitrarily arrest and imprison those who they choose to harass on the ground that they feel the person has made "unreasonable noise". This is particularly so when the unreasonable noise which has been made by the citizen involves the exercise of his First Amendment rights. See Comment, Recent Supreme Court Development for the Vagueness Doctrine, 7 Conn. L. Rev. 94, 100 (1974); Note, The Void for Vagueness

Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 I1960). Therefore, Petitioner respectfully requests to be permitted to present to this Court the issue of the constitutionality of this statute.

Additionally, Petitioner has included two other issues in his statement of the questions presented for review. One of these other issues deals with the question of whether the Commonwealth introduced sufficient evidence to constitute the crime of "making unreasonable noise." Petitioner submits this issue to this Court because of the established rule that if the Court can decide a case without reaching the constitutional issue it should do so. Therefore, this Court

should first review the question of whether the Commonwealth met its burden of proof before reaching and deciding the constitutional issue which is the primary basis of this appeal.

Finally, the third question presented for review deals with the other crime of which defendant was convicted--obstructing administration of law or other governmental function. Petitioner raises this issue because, in order for the Commonwealth to prove that the defendant committed this crime, the Commonwealth must also prove that the defendant committed some "other unlawful act". Inasmuch as the charge of disorderly

conduct by "making unreasonable noise" must be dismissed upon one of the above grounds, the defendant cannot be convicted of any other unlawful act and the charge of obstructing administration of law or other governmental function must also be dismissed.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court allow him to appeal from the Order of the Superior Court of Pennsylvania, Philadelphia District, to No. 1234 October Term, 1977, filed November 30, 1977.

Respectfully submitted,
MacElree, Harvey, Gallagher
& Kean

By: (s) R.L. Sebastian
Wm. J. Gallagher
Randy L.Sebastian
Attorneys for Petitioner

[Note: Proof of Service and exhibits omitted, the opinion judgment of the Superior Court, statutory provision, and Opinion and Order of the Court of Common Pleas being appended to this brief.]

ORDER GRANTING PETITION

SUPREME COURT OF PENNSYLVANIA
Eastern District

"May 2, 1978
Petition granted
Per Curiam"

B-17

A P P E N D I X "C"

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1234 October Term, 1977

Commonwealth of Pennsylvania

vs.

Thomas Mastrangelo,

Appellant

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Chester County, at No. 34676.

PER CURIAM, Filed Nov. 30 1977:

Judgment of sentence affirmed.

HOFFMAN, J., dissents.

C-1

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Please of CHESTER County be, and the JUDGMENT OF SENTENCE is hereby AFFIRMED.

By the Court:

(s) Charles A. Hoenstine
Prothonotary

Dated: November 30, 1977

A P P E N D I X "D"

N THE COURT OF COMMON PLEAS OF
CHESTER COUNTY, PENNSYLVANIA
CRIMINAL

NO. 0346 of 1976

Commonwealth of Pennsylvania

vs.

Thomas J. Mastrangelo

Appearances

lores M. Troiani, Esquire,
sistant District Attorney for
e Commonwealth.

lliam J. Gallagher, Esquire, for
e Defendant.

OPINION

Gates, P.J. 52nd Judicial District,
Specially Presiding, February 16,
A.D. 1977.

A non-jury trial on July 12, 1976 resulted in the defendant being found guilty of obstructing the administration of law or other governmental function (Pa. Crimes Code 5101) and disorderly conduct (Pa. Crimes Code 5503(a)(2)).

Thereafter, the defendant moved to arrest the judgment or, alternatively, he asks for a new trial.

Diane Young, a meter maid employed by Phoenixville Borough, testified that she was on duty February 3, 1976 patrolling on Bridge Street in Phoenixville, Chester County, Pennsylvania. She was ticketing illegally parked cars. On that date she tagged an automobile owned by the defendant. The defendant apparently saw this from his place of

business, known as the "Blue Jay," and went outside and began yelling obscenities at the meter maid for writing-up his illegally parked car. At the time there were other people on the street in the area.

On the following day the meter maid was again on Bridge Street in front of the "Blue Jay" when she noticed the defendant's car, but this time legally parked. However, the defendant again came out and began harassing the meter maid and calling her vile names in a loud voice. Again there were other people on the street in the vicinity. The meter maid testified that she was frightened by his manner and conduct and she told him to leave her alone and stop bothering her. She tried to

walk away but he followed her up the street repeating degenerate epitaphs in a loud, sarcastic and nasty tone of voice.

The next occasion Diane Yound was in the area of Bridge Street was on February 13th, 1976. Once more she found Mastrangelo's car illegally parked. She testified that, although scared, she went to the car and began writing-up a parking ticket. Once more she saw Mastrangelo looking at her through the window from his place of business. He quickly came out yelling at her and calling her obscene names in a loud and threatening manner. He followed her up the street calling her names and standing close to her.

The meter maid testified that during

the period between February 4 and February 13 she did not patrol Bridge Street in the area of the defendant's neighborhood because she was frightened of him.

As a result of this misconduct, the defendant was charged with violating several provisions of the Pennsylvania Crimes Code.

We shall consider the defendant's assigned reason separately.

His first reason is that the evidence was insufficient to show that the defendant made unreasonable noise. His second reason is closely related to the first in that he contends that a statute creating criminal liablity if a person does make

unreasonable noise is unconstitutional due to vagueness.

The new Pennsylvania Crimes Code, Section 5503 defines disorderly conduct in the identical language suggested in the Model Penal Code, Tentative Draft No. 13, Section 250.1 (1961). This is precisely a legislative response to the vagueness argument which was recognized as early as 1963 in Commonwealth v. Greene, 410 Pa. 111 (1963). The offense presently requires that the actor intend to cause public inconvenience, annoyance or alarm by making unreasonable noise or using obscene language which creates physically offensive conditions which serve no legitimate purpose. Where, as here, the conduct persists after

reasonable warning or request to desist it is a misdemeanor of the third degree.

We find no difficulty in discovering an unlawful intent on the part of Mastrangelo by his conduct. It was calculated to annoy, alarm and frighten the meter maid. He did this in an unreasonable way by using loud, boisterous and extremely obscene, abusive language. He continued after being told to stop. His conduct is clearly proscribed by the statute.

We also are of the opinion that the statuory language comports with the United States Supreme Court guidelines on vagueness and does not interfere with reasonable free speech under the first amendment. Coates v. City of

Cincinnati, 402 U.S. 611 (1971). Commonwealth v. Weiner, 230 Pa. Super. 245 (1974).

The expression "reasonable" is the touchstone of American Jurisprudence. It is conduct employed by a reasonable person under the circumstances. It is the Standard of conduct employed in many provisions of our Crimes Code, in our Tort Law of Negligence, in our Uniform Commercial Code and in countless other bodies of statutory law. If we were to hold that the word "reasonable" and its antonym "unreasonable" are constitutionally vague we would be erasing a substantial body of law which defines the standard of conduct for citizens in Pennsylvania.

The defendant's conduct in yelling

obscenities and following the meter maid in full view of the public, under the circumstances presented in this case, is clearly not the conduct which would be employed by a reasonable and prudent person. Consequently, it was unreasonable and statutorily forbidden.

We recognize that it is the policeman's unhappy lot to be dealing with unruly and unrefined elements of our population. Their customary standards of communication may well include loudness and their knowledge of English adjectives limited to obscenities. Ordinarily, this is to be considered as part of the job. But where, as here, it is so offensive and persistent that it interferes with the

proper and orderly governmental functions of a meter maid, the conduct cannot be excused or overlooked.

On the balance the record amply supports the trial judge's verdict that the defendant was guilty beyond a reasonable doubt of disorderly conduct and of obstructing the administration of justice or other governmental function.

The defendant also complains that the trial judge committed error when he allowed the witness to read from certain of the defendant's exhibits.

During the cross-examination of the meter maid, counsel for the defendant was clearly attacking her credibility. He questioned her at length as to

whether or not she wrote down the incidents in some form of a report. When she indicated that she did, defense counsel demanded that he be permitted to see these incident reports. Inasmuch as they were not then in the possession of the witness, the defendant asked for a continuance until the reports could be made available to him. The trial judge granted the defedant's request to allow the witness to obtain the incident reports from the Phoenixville Police Station.

When the reports were produced, the defendant had them marked as his exhibits D-2 through D-8, Counsel for the defendants then showed the exhibits to the witness and asked her

a series of questions calculated to disclose matters which may bear upon the witness's credibility. (N.T.29-etc.) Apparently counsel for the defendant felt that he did not score many points with this line of inquiry so he did not offer the exhibits into evidence. However, on cross-examination counsel for the Commonwealth did ask the witness to read from certain of the reports to corroborate her previous statements.

Of course it's true that prior consonant statements are not admissible in evidence in the party's case in chief. However, where the purpose of cross-examination is to infer recent fabrication or want of credibility,

evidence in support of the witness's direct testimony is rendered admissible. Thus, prior consonant statements may be used in rebuttal where a witness's testimony has been challenged for veracity, accuracy or general credibility. Commonwealth v. Marino, 213 Pa. Super. 83 (1968); Commonwealth v. Cooper, 230 Pa. Super. 204 (1974); Commonwealth v. Whyatt, 235 Pa. Super. 211 (1975).

We have reviewed the record carefully and find no basis either to arrest the judgment or to award a new trial.

ORDER OF COURT

AND NOW, to wit, February 16, A.D., 1977 the defendant's post-trial motions are refused and the defendant is ordered to appear before us on the 1st day of March, 1977 at 10:00 a.m. for sentencing.

By the Court

(s) G. Thomas Gates P.J.

G. Thomas Gates

52nd Judicial District

Specially Presiding

A P P E N D I X "E"

THOMAS J. MASTRANGELO,
Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA
Appellee

No. 0346 of 1976
(Court of Common Pleas of Chester Co.)

No. 1234 October Term, 1977
(Pa. Superior Court)

No. 203 JANUARY TERM, 1978
(Pa. Supreme Court)

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Thomas J. Mastrangelo, the appellant above-named, hereby appeals to the Supreme Court of the United States from the

final Order of the Supreme Court of Pennsylvania affirming the judgment of convictions, entered herein on April 28, 1980.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

MacELREE, HARVEY, GALLAGHER, O'DONNELL & FEATHERMAN, LTD.

BY: _____

WILLIAM J. GALLAGHER
Attorney for Appellant
17 West Miner Street
West Chester, PA 19380
(215)-436-0100

Certified From The Record
This 24th Day of June 19 80
Jean Mattioni
Deputy Clerk Quarter Sessions Court

THOMAS J. MASTRANGELO,

vs.

COMMONWEALTH OF PENNSYLVANIA

No. 0346 of 1976
(Court of Common Pleas of Ches. Co.)

No. 1234 October Term, 1977
(Pa. Superior Court)

No. 203 January Term, 1978
(Pa. Supreme Court)

CERTIFICATION OF SERVICE

I, William J. Gallagher, attorney for the appellant, Thomas J. Mastrangelo, do hereby certify that on June 19, 1980, I served a true and correct copy of the Notice of Appeal on the Commonwealth of Pennsylvania, appellee, by hand-delivering 3 copies of the Notice of Appeal to the office of Lee Ruslander, Chief of Appeals, District Attorney's Office,

Courthouse Annex, West Chester,

Pennsylvania.

MacELREE, HARVEY, GALLAGHER,
O'DONNELL & FEATHERMAN, LTD.

BY: _____
WILLIAM J. GALLAGHER

80-55

FILED
JUL 30 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 80-55

THOMAS J. MASTRANGELO,
Appellant

vs.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

On appeal from the Supreme Court
of Pennsylvania

APPELLEE'S MOTION TO DISMISS OR AFFIRM

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IN THE
SUPREME COURT OF THE UNITED STATES

NO. 80-55

THOMAS J. MASTRANGELO,
Appellant

vs.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

MOTION TO DISMISS OR AFFIRM

On appeal from the Supreme Court of Pennsylvania

.....

Pursuant to United States Supreme Court Rule 16, appellee, the Commonwealth of Pennsylvania, hereby moves this Court to dismiss this appeal on the ground that

it does not present a substantial federal question, or, in the alternative, to affirm the decision of the Court of Appeal of the Commonwealth of Pennsylvania on the ground that the question presented is so insubstantial as not to warrant consideration by this Court.

STATEMENT OF THE CASE

The opinion of the Pennsylvania Supreme Court attached to the Jurisdictional Statement as Appendix, adequately sets forth the factual and procedural matters which have transpired.

STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the Constitution of the United States.

This case also involved the Pennsylvania Crimes Code section 5503 which states:

> (a) Offense defined. - A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance and alarm, or recklessly creating a risk thereof, he:
>
> (2) makes unreasonable noise.*

This case also involves Pennsylvania Crimes Code section 5101 which states:

> A person commits a misdemeanor of the second degree if he intentionally obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act, except that this section

---

*This section closely follows the Model Penal Code, §250.1 [Tentative Draft No. 13 (1961)]

> does not apply to flight by a person charged with a crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

QUESTIONS PRESENTED

i. DID THE PENNSYLVANIA SUPREME COURT USE AN APPROPRIATE STANDARD IN DETERMINING THAT THE STATE'S DISORDERLY CONDUCT STATUTE WAS CONSTITUTIONAL ON ITS FACT?

ii. DID THE PENNSYLVANIA SUPREME COURT'S CONSTRUCTION OF THE STATE'S DISORDERLY CONDUCT STATUTE ALLEVIATE IT OF POSSIBLE DUE PROCESS CHALLENGES FOR VAGUENESS?

iii. DID THE PENNSYLVANIA SUPREME COURT PROPERLY HOLD THAT "UNREASONABLE NOISE" WAS NOT CONSTITUTIONALLY VAGUE, ESPECIALLY IN LIGHT OF PRIOR APPELLATE DECISIONS IN THAT STATE?

iv. DID THE PENNSYLVANIA SUPREME COURT PROPERLY UPHOLD THE APPELLANT'S CONVICTION FOR OBSTRUCTING THE ADMINISTRATION OF JUSTICE OR OTHER FUNCTION?

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

(i)

THE PENNSYLVANIA SUPREME COURT USED THE APPROPRIATE STANDARD IN DETERMINING THAT THE STATE'S DISORDERLY CONDUCT STATUTE WAS CONSTITUTIONAL ON ITS FACE.

The appellant first alleges that the Pennsylvania Supreme Court erred in failing to use the proper standard to determine whether the state's disorderly conduct statute chills Constitutional rights on its face. The body of the Jurisdictional Statement, however, not only fails to mention with any specificity the manner in which the opinion below was wanting, but is makes no reference to that court, to its opinion, or to the standard(s) by which he feels the statute should have appropriately been measured. The Statement instead criticizes this Court's alleged erosion of the "void-for-

vagueness" doctrine by reason of its decision in Colten v. Kentucky, 407 U.S. 104 (1972).

A reading of the decision of the Pennsylvania Supreme Court shows that the appellant's actions were evaluated in a manner consistent with the Colten case. The court first examined the disorderly conduct statute for overbreadth or vagueness and then examined the defendant's conduct in light of its construction of the law.

The Pennsylvania Supreme Court limited the construction to be given the statute by stating,

> "We believe a man of common intelligence would understand what is and what is not made criminal under this statute, especially after we now make clear that the disorderly conduct statute may not be used to punish anyone exercising a protected First Amendment right.

> By so limiting this statute, appellant's facial attack concerning the vagueness of the disorderly conduct statute must fail. (Citation omitted)."

Com. v. Mastrangelo, ____ Pa. ____, ____, 414 A.2d 54, 58 (1980).

The foregoing standard bears a remarkable similarity to the language of the Court of Appeals of Kentucky which was upheld by this Court.

> "We believe that citizens who desire to obey the statute will have no difficulty in understanding it, relying, as they are entitled to, that the statute will be construed sensibly and reasonably. It is true that the statute will be construed sensibly and reasonably. It is true that the statute does not attain idealistic perfection in preciseness, but it is fully as precise as some of the language in the Bill of Rights."

Colten v. Commonwealth, 467 S.W. 2d 374, 378 (Ky.Cl.App. 1971). See also Colten v. Kentucky, 407 U.S. at 110, 92 S. Ct. at 1957, 32 L. Ed. 2d at 590.

The Pennsylvania Supreme Court, as did the Colten court, next examined the appellant's conduct in light of its construction of the disorderly conduct statute. It had no difficulty in characterizing the appellant's conduct as unprotected "fighting words", referring to the oft cited definition of the same from Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), and then holding,

> "It is clear in the instant case that appellant was not exercising any constitutionally protected right; rather, in a loud, boisterous and disorderly fashion, he hurled epithets at the meter maid which we believe fit the Chaplinsky definition of fighting words. Even under our narrow construction of the disorderly conduct statute, we can find no merit in appellant's argument that the statute was invalid as applied to him."

Com. v. Mastrangelo, ____ Pa. ____, ____, 414 A.2d 54, 58 (1980).

THE PENNSYLVANIA SUPREME COURT'S CONSTRUCTION OF THE STATE'S DISORDERLY CONDUCT STATUTE ALLEVIATED IT OF POSSIBLE DUE PROCESS CHALLENGES FOR VAGUENESS.

The appellant next alleges that even if the Pennsylvania Supreme Court employed the proper criteria in testing the disorderly conduct statute's constitutionality, its decision did not alleviate the statute of its unconstitutional vagueness. The thrust of the appellant's argument here is that the decision of the Pennsylvania court "did not distinguish the point at which a citizen's intent to exercise free speech must give way to the public's need for order and freedom of (sic from) inconvenience. A citizen thus has no way of determining at what point he may be found to be recklessly creating a public inconvenience." [1] Jurisdictional Statement, p. 29.

In a per curiam rejection of a due process challenge for vagueness to the Tennessee statute making criminal "crimes against nature", Tenn. Code Ann. §39-707, this Court said,

> "It is well settled that the fair-warning requirement embodied in the Due Process Clause prohibits the States from holding an individual "criminally responsible for conduct which he could not reasonably understand to be proscribed." United States v. Harriss, 347 U.S. 612, 617, 74 S. Ct. 808, 812, 98 L. Ed. 2d 179 (1954); see Wainwright v. Stone, 414 U.S. 21, 22, 94 S. Ct. 190, 38 L. Ed. 2d 179 (1973). But this prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness, for "(i)n most English words and phrases there lurk uncertainties," Robinson v. United States, 324 U.S. 282, 286, 65 S. Ct. 666, 668 89 L. Ed. 944 (1945). Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any

> certainty what some statute may compel or forbid. C.P. Nash v. United States, 229 U.S. 373, 33 S. Ct. 780, 57 L. Ed. 1232 (1913); United States v. National Dairy Corp., 372 U.S. 29, 83 S. Ct. 594, 9 L. Ed. 2d 561 (1963). All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden."

Rose v. Locke, 423 U.S. 48, 49-50, 96 S.Ct. 243,244, 46 L.Ed. 2d 185, 188 (1975).

Moreover, the Colten Court made it clear that the vagueness doctrine dealt with a "rough idea of fairness". 407 U.S. at 590, 92 S. Ct. at 1957, 32 L. Ed. 2d at 590. "The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. Connally v. General Construction Co., 1926, 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322." Jordan v. DeGeorge, 341 U.S.

223, 231-232, 71 S. Ct. 703, 708, 95 L. Ed. 886 (1951). (See opinion of court below citing Connally v. General Construction Co., at ____ Pa. at ____, 414 A.2d at 56). Vagueness "is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited". 407 U.S. at 110, 92 S. Ct. at ____, 32 L. Ed. 2d at 590. Even since Colten the Court has recognized,

> "There are areas of human conduct where, by the vary nature of the problems presented, legislatures simply cannot establish standards with great precision. Control of the broad range of disorderly conduct that may inhibit a policeman in the performance of his official

> duties may be one such area, requiring as it does an on-the-spot assessment of the need to keep order. Cf. Colten v. Kentucky, 407 U.S. 104, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972)."

Smith v. Goguen, 415 U.S. 566, 581, 94 S. Ct. 1242, 1251, 39 L. Ed. 2d 605, 616 (1974).

(iii)

THE PENNSYLVANIA SUPREME COURT PROPERLY HELD THAT "UNREASONABLE NOISE" WAS NOT UNCONSTITUTIONALLY VAGUE ESPECIALLY IN LIGHT OF PRIOR APPELLATE DECISIONS IN THAT STATE.

The appellant next alleges that the Pennsylvania disorderly conduct statute is constitutionally infirm in proscribing "unreasonable noise", since that provides no "sufficiently ascertainable standard by which to adjudge conduct criminal and also permits police officers too wide a latitude to be constitutionally

permissible". Jurisdictional Statement, p. 32. In short, the appellant believes the standard of "unreasonable noise" to be so vague in itself as to violate due process.[2.]

The Pennsylvania Supreme Court placed a construction on the challenged words. Not only were these words interpreted so they "could not be used to punish anyone exercising a protected First Amendment Right," ____ Pa. at ____, 414 A.2d at 58, but they were also interpreted in terms of the disorderly conduct statute's predecessor act.[3.]

In construing the predecessor disorderly conduct statute the Pennsylvania Supreme Court found "unseemly noise" to be that which is "not fitting or proper in respect to the conventional standards of organized society or a legally con-

stituted community". Com. v. Greene, 410 Pa. 111, 113, 189 A.2d 141, 143 (1963); Com. v. Weiner, 230 Pa. Super. 245, 249, 326 A.2d 896 (1974). The court below equated "unreasonable noise" with "unseemly noise" and held this to be a sufficently specific guideline in light of the foregoing argument (ii).

"Unreasonable" has, in fact been held to be a sufficiently specific criterion by this Court on prior occasions. In Nash v. United States, 229 U.S. 373 (1913) the Court speaking through Mr. Justice Holmes, held "unreasonable restraint of trade" under the Sherman Act[4]. to be a sufficient guideline.

> "(The) law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If he is wrong, not only may he incur a fine or a

> short imprisonment, as here; he may incur the penalty of death. "An act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it" by common experience in the circumstances known to the actor ... "The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct. (Citations omitted.)"

229 U.S. at 377, 233 S. Ct. at 781, 57 L. Ed. at 1235. See also Bandini Petroleum Co. v. Superior Court, 284 U.S. 8, 52 S. Ct. 103, 76 L. Ed. 136 (1931), upholding a state statute authorizing the state attorney general to seek civil remedies against petroleum companies for their "unreasonable waste of natural gas."

It is also submitted that the cases relied upon by the appellant in support of his proposition that "unreasonable noise" is unconstitutionally vague do not

control the instant case. All of the cases except Marks v. City of Anchorage, 500 P. 2d 644 (Alaska 1972) and Poole v. State, 524 P. 2d 286 (Alaska 1974) were decided before the Court's decision in Colten. Marks was decided a mere eleven days after the Colten decision, and the court made no mention of that case until it denied Rehearing. Several of the cases cited upheld vagueness challenges to ordinances or statutes where the respective state's highest courts had placed no limiting construction on the challenged laws. Lewis v. City of New Orleans, 415 U.S. 130, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974); Gooding v. Wilson, 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972); Coates v. City of Cincinnati, 402 U.S. 611, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971); and Gardner v. Ceci, 312 F.

Supp. 516 (E.D. Wis. 1970); Original Fayette County Civic and Welfare League Inc. v. Ellington, 309 F. Supp. 89 (W.D. Tenn. 1970). In Pritikin v. Thurman, 311 F. Supp. 1400 (S.D. Fla. 1970) and Cohen v. California, 403 U.S. 15, 91 S. Ct. 1780, 29 S. Ed. 2d 284 (1971) the courts struck down, respectively, a Florida ordinance and a California statute not so much because of those laws' proscriptions against "loud noise" and "unusual noise" but because of vagueness in other proscribed areas which had not been remedied by the courts' construction of the laws.

In Pritikin the court said,

> "The Florida state courts have given Constitutional approval to disorderly conduct and breach of the peace ordinances which prohibit making or causing to be made loud, unusual and offensive noises and disturbances, (Citations omitted) and which prohibit profane language and loud and

> disturbing and obnoxious noises. (Citations omitted). Those decisions, however, do not narrow the remaining language of this ordinance so as to sustain its constitutionality. (Emphasis added). 311 F. Supp. at 1402."

The remaining language which offended that court included "offensive conduct" and "offensive carriage".

In Cohen the Court found fault with the overbreadth of California Penal Code §415 which prohibited "maliciously and willfully disturbing the peace or quiet of any neighborhood or person... by ... offensive conduct....". Besides noting the failure of the statute to consider the intent of the actor (see endnote 1 p. 26), it is noted that additional subsections of the questioned statute were looked upon favorably by the Court. See 403 U.S. at 22 n.4, 91 S. Ct. at 1786 n. 4, 29 L. Ed. 2d at 292 n. 4.

In Marks v. City of Anchorage the Alaskan Supreme Court struck down the city's disorderly conduct statute which read, in part,

> "It shall be unlawful for any person with purpose and intent to cause public inconvenience, annoyance and alarm, or recklessly create a risk thereof by: ... (2) Making unreasonable noise or offensively coarse utterance, gesture, or display, or addressing abusive language to any person present... "

Ordinance 17-70, §1, codified as §15-1 (mm), Anchorage Code of Ordinances (1970). It is respectfully submitted that the Alaskan Supreme Court erred in holding the ordinances prefatory language relating to intent to be unconstitutional. The same language was upheld in Colten. But it is noted that the action reached the Alaskan court by way of a class action seeking to have the

ordinance declared unconstitutional. The city filed no brief with the court and made no attempt whatsoever to introduce any construction of the ordinance by the court. The court declined to place a construction on the ordinance and found it to be unconstitutionally vague on its face. Marks is, thus, distinguishable from the instant case which placed a limiting construction on the Pennsylvania statute.

The Court of Appeals of Oregon has upheld the same provision of its disorderly conduct statute for which appeal is sought herein. In State v. Marker, 536 P.2d 1273 (Or. App. 1975) the court said "unreasonable noise" was a sufficiently specific standard to satisfy the requirements of a penal statute.

When speech is involved it can be

> "classified prohibited noise only if there is a clear and present danger of violence or if the communication is not constitutionally protected speech but merely a guise to disturb persons. 536 P.2d at 1277."

Clearly, "unreasonable noise" is an adequate standard which gives fair notice of proscribed conduct and clearly, the appellant's conduct cannot be considered as protected.

(iv)

THE PENNSYLVANIA SUPREME COURT PROPERLY UPHELD THE APPELLANT'S CONVICTION FOR OBSTRUCTING THE ADMINISTRATION OF JUSTICE OR OTHER FUNCTION SINCE THAT OFFENSE WAS BASED UPON A VALID CONVICTION UNDER A CONSTITUTIONAL DISORDERLY CONDUCT STATUTE.

The appellant last alleges that his conviction for Obstructing the administration of justice or other function, 18 C. P.S.A. §5101, cannot stand if he is con-

victed of disorderly conduct under an unconstitutional statute. The Commonwealth of Pennsylvania concedes that the conviction for "obstructing" cannot stand in the present case without the conviction for disorderly conduct since the Pennsylvania court concluded,

> "Instantly, appellant, through a course of disorderly conduct, intentionally obstructed a meter maid from carrying out her lawful duties and was thus properly convicted by more than sufficient evidence."

____ Pa. at ____, 414 A.2d 60.

It is by no means conceded, however, that the conviction for disorderly conduct is constitutionally infirm, and it is therefore suggested that the conviction for obstructing was entirely proper.

CONCLUSION

No substantial federal question is presented by this appeal. Appellee respectfully move the Court to dismiss the appeal or, in the alternative, affirm the decision of the Pennsylvania Supreme Court.

DATED: July 28, 1980.

Respectfully submitted,

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ENDNOTES:

1. The appellant's argument (ii) also makes reference to the failure of the Pennsylvania Supreme Court to "look to the intent of the defendant", but instead concentrated "on whether or not the statute provided fair notice of what was proscribed behavior". Jurisdictional Statement, p. 28. It is obvious from a reading of the decision below, however, that considerable emphasis was placed on the actor's intent. See citation from 78 Dick. L. Rev. 15, 30 (1973), which is incorporated into the opinion below at ____ Pa. ____, ____, 414 A.2d 57-58. With respect to the issue of intent, it has been held,

> "The requirement of a specific intent to do a prohibited act may avoid the consequences to the accused which may otherwise render a vague or indefinite statute invalid.... The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware."

Screws v. United States, 325 U.S. 91, 101-102, 65 S. Ct. 1031, 1035-1036, 89

L. Ed. 1495 (1945) (plurality opinion). Colautti v. Franklin, 429 U.S. 379, ____ n. 13, 99 S. Ct. 675, 683 n. 13, ____L. Ed. 2d ____, ____ n. 13 (1979).

2. The appellee is mindful of the appellant's reliance on a footnote to the Colten opinion. That note states

> Appellant attacks on overbreadth grounds other subsections of the disorderly conduct statute, such as those that prohibit the making of an "unreasonable noise" and the use of "abusive or obscene language". Ky. Rev. Stat. §437.016 (c) (Supp. 1968). But Colten was not convicted of violating these subsections and they are not properly before us in this case.

407 U.S. at 111 n.3, 92 S. Ct. at 1958 n. 3, 32 L. Ed. 2d at 591 n. 3.

3. Whoever wilfully makes or causes to be made any loud, boisterous and unseemly noise or disturbance to the annoyance of the peaceable residents near by, or near to any public highway, road, street, lane, alley, park, square, or common, whereby the public peace is broken or disturbed or the traveling public annoyed, is guilty of the offense of disorderly conduct.... Law of June 24, 1939, P.L. 872, §406, as amended March 23, 1970, P.L. ____, No. 84, §1.

4. 15 U.S.C.S. §1 et seq. (Lawyers Co-Op. 1975).